Supreme Court U.S.
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No. 01-1238

IN THE

Supreme Court of the United States

CITY OF OPA LOCKA,

Cross-Petitioner,

v.

A. GRIFFIN,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

PHILIP FREIDIN
FREIDIN & BROWN, P.A.
Two South Biscayne Blvd.
Suite 3100
Miami, FL 33131
(305) 371-3666

ELLEN C. FREIDIN
Counsel of Record
AKERMAN, SENTERFITT & EIDSON, P.A.
One Southeast Third Avenue
28th Floor
Miami, FL 33131-1714
(305) 374-5600

Attorneys for Cross-Respondent

173085

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court of Appeals followed the decisions of this Court and other Courts of Appeals when it ruled that the record evidence supported the jury's conclusion that Earnie Neal acted pursuant to his power as City Manager, abused that power to facilitate the rape, and therefore acted under color of law when he assaulted Ms. Griffin.

STATEMENT OF THE CASE

The Statement of the Case of Conditional Cross-Petitioner City of Opa Locka ("the City") is grossly incomplete. It omits to tell the whole story of what the City and Earnie Neal did to Ms. Griffin and the way Neal abused his power as City Manager to facilitate the rape. Specifically it fails to detail the predatory workplace harassment of Ms. Griffin by Neal and the events of the night of the rape which establish that Neal was acting under color of law. Rather than burdening this Court with a lengthy repetition of the facts here, Ms. Griffin refers the Court to the comprehensive summary of the facts contained in the opinion of the Eleventh Circuit. App. 3a-7a; 14a-18a; 19a n.9; 21a n.11; 23a-30a. Upon reading these facts, it should be clear to this court — as it was to the jury and to the Eleventh Circuit — "that Neal used his authority as City Manager to facilitate the assault on Griffin and that he was therefore acting under color of law at the time of the assault." App. 17a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

It is not surprising that the City has omitted to present a statement of the facts which includes the record evidence that the jury and the Eleventh Circuit relied on in finding that Neal acted under color of law when he raped Ms. Griffin. From the outset the City has maintained that Neal's acts that night were of a private or personal nature. Even in the face of this evidence, the jury's finding that the assault was under color of law, and the Eleventh Circuit's affirmance on that point, the City acts like an ostrich with its head in the sand, as if the facts do not exist. It continues to maintain that the events of November 1, 1995, had nothing to do with Neal's position as City Manager and the authority and power he derived therefrom.

To avoid the color of law finding, the City asserts that *Griffin v. Opa Locka*, conflicts with a number of other decisions and also that the Eleventh Circuit "expanded the scope" and announced a new standard for what actions will be considered to be under color of law. Essentially, the City continues to ignore the evidence and asserts that in raping Ms. Griffin, Neal was on a frolic of his own — not acting under color of law. It is clear, however, from a reading of the pertinent parts of the opinion, that there is no conflict and no extension of the law.

As to the City's claims of conflict, not a single one of the cited cases is factually analogous to the case at bar. Each of them relies on and applies the same well settled color of law analysis that was applied by the Eleventh Circuit in this case. None of them state a rule of law that differs in any way from that applied in *Griffin*. The Court of Appeals addressed and distinguished most of the cases that the City alleges to be in conflict. *See* App. 20a-22a for discussion of inapplicability of *Becerra v. Asher*, 105 F.3d 1042 (5th Cir. 1997); *Roe v. Humke*, 128 F.3d 353 (6th Cir. 2001); *D.T. v. Independent School Dist No. 16*, 894 F.2d 1176 (10th Cir. 1990); and *Almand v. DeKalb County*, 103 F.3d 1510 (11th Cir. 1997). Ms. Griffin relies on the Eleventh Circuit's analysis of these cases and incorporates it herein to show that the decisions have no application to the instant facts and therefore cannot form the basis for conflict jurisdiction. The other cases cited by the City will be discussed below.

Polk County v. Dodson, 454 U.S. 312 (1981) addressed the question of "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." *Id.* 315. This Court held in the negative because of the independent nature of the attorney's

relationship and obligations to the client notwithstanding that the attorney was employed by the state. There was no attorney-client or other relationship of independent loyalty in *Griffin*. *Polk County v. Dodson* is not analogous and does not conflict with the decision in this case.

United States v. Classic, 313 U.S. 299, 326 (1941) simply held that a person acts under color of law when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." The detailed recitation of the facts in the Eleventh Circuit's decision establishes that Neal used his authority as City Manager to: (1) dismiss others that offered to take Ms. Griffin home; (2) have her park her car at the City police station; (3) talk to her about work while he drove her home; and (4) enter her apartment. When Ms. Griffin resisted his sexual advances, Neal reminded her of his power as City Manager. App. 14a-17a. The Eleventh Circuit actually relied on *United States v. Classic* in reaching its decision. App. 13a. The decision does not conflict with this case.

Neither is there conflict with *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001). Waters sued her veterinarian employer under 42 U.S.C. § 1983 for various harassing conduct. She claimed that his actions were under color of law because he was also a city alderman. The court applied the very same analysis applied by the *Griffin* court and concluded that the harassment occurred as a result of the "close personal relationship" and the employer/employee status between Waters and the veterinarian. The court noted that the veterinarian "would have been in the same position to harass and abuse Waters even if he had not been a city alderman." 242 F.3d 359. The instant facts are quite different. As fully explained by the Eleventh Circuit, Neal and

Ms. Griffin had no relationship at all outside of her role as city employee and his role as City Manager. App. 21a n.11. Neal unquestionably used his power as City Manager to facilitate the rape and, but for that power, Ms. Griffin would have had another ride home and the rape would have not occurred.

Similarly, *Jojola v. Chavez*, 55 F.3d 488 (10th Cir. 1995) presents no conflict. There a school janitor molested a student. The court simply ruled that the janitor could not have been acting under color of law because — unlike Neal — he neither had any state authority over the student nor used such power to facilitate his acts. *Jojola* presents no conflict.

Next the City asserts that the Eleventh Circuit has extended the color of law analysis to include acts "committed by government officials in their private lives." Conditional Cross-Petition at p. 4. Specifically, the City complains that by its decision, the Court of Appeals has extended "federal jurisdiction to the torts committed by public officials *in their private lives*, even where the tortuous (*sic*) action is not connected with the official's function, not made possible by the official's authority and is not fairly attributable to the state." Conditional Cross-Petition, p. 6 (emphasis added).

The Court of Appeals held that on the night of the rape, "Neal utilized his authority as City Manager to facilitate the assault on Griffin and that he was therefore acting under color of law at the time of the assault. . . ." App. 17a. This is not an extension of the color of law analysis to acts of Neal in his private life. The court's analysis correctly focused on the rape as it related to Neal's function as City Manager, his misuse of authority and the consequences thereof. App. 14a, 17a.

The City quotes three passages from the appellate decision that discuss the relevance of Neal's conduct with Ms. Griffin prior to the night of the rape. It contends that these references to the workplace harassment somehow establish a new standard for determining whether a city official acted under color of law. If there were no facts to support an independent conclusion that Neal was acting under color of law at the time he raped Ms. Griffin, perhaps the events that preceded the night of the incident would not be relevant. But such is not the case here where, on the night in question, Neal used his municipal authority to facilitate the assault and even reminded his victim of this power as he raped her. This is not an extension of the law and certainly not a basis for this Court to exercise its certiorari jurisdiction.

Finally the City argues that this court should grant certiorari because it has not opined lately on the color of law issue "in the context of a wrong committed by a person employed by a governmental entity outside the course and scope of their employment function." Conditional Cross-Petition at p. 7. This opinion does not present conflict with any decision of any other court and does not state a new rule of law or change an existing one. The well established color of law analysis was applied. Accordingly, the lack of a recent opinion is hardly a ground for jurisdiction. Especially where, as here, there was ample evidence to support the jury's finding and the Eleventh Circuit's affirmance that Neal acted under color of law when he raped Ms. Griffin.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the Conditional Cross-Petition should be denied.

Respectfully submitted,

ELLEN C. FREIDIN
Counsel of Record
AKERMAN, SENTERFITT & EIDSON, P.A.
One Southeast Third Avenue
28th Floor
Miami, FL 33131-1714
(305) 374-5600

PHILIP FREIDIN
FREIDIN & BROWN, P.A.
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